No. 85-1245

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

GAF CORPORATION,

Petitioner,

v.

JESSE WERNER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION

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February 20, 1986

QUESTION PRESENTED

Should there be an overriding judicial exception to the Federal Arbitration Act preventing arbitration of a dispute pursuant to an arbitration provision in an employment contract, because the corporation is publicly-held and has instituted litigation alleging state law claims of corporate waste by the employee which the corporation contends it may have to assert as defenses in the arbitration to avoid the potential of collateral estoppel?

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OPINION BELOW

The opinion of the New York Court of Appeals (Pet. App. A-1-9) is reported at 66 N.Y.2d 97 (1985).

JURISDICTION

The decision and remittitur of the Court of Appeals is dated and entered October 22, 1985 (Pet. App. A-10-11). Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1257(3).

STATUTE INVOLVED

The statute involved is the Federal Arbitration Act, 9 U.S.C. §1, *et seq.* Sections 2, 3 and 4 are reprinted at Pet. App. A-30-31.

REASONS FOR NOT GRANTING THE WRIT

GAF's petition is frivolous in law and meretricious and deceptive in its "factual" assertions. It is unnecessary to burden this Court with specific responses to the aspersions cast on Jesse Werner ("Dr. Werner") and on the former Board members, which are irrelevant to the legal issue facing the Court.*

The decision of the Court of Appeals below does not conflict with the decision of any state court of last resort or any federal court of appeals nor is its decision in any way in conflict with the applicable decisions of this Court (Rule 17.1 of the Rules of this Court). Indeed, the decision of the New York Court of Appeals is entirely consistent with the holdings, language and spirit of this Court's trilogy of decisions in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983), *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984), and *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. ——, 105 S.Ct. 1238 (1985).

For instance, the "federal question" which petitioner claims is presented in this case (albeit misleadingly stated by petitioner) is definitively answered by this Court in the first of such trilogy, *Moses H. Cone Memorial Hospital.* Thus, GAF contends that if the Federal Arbitration Act compels arbitration in this case of the employment contract dispute between Dr. Werner and GAF, it would be contrary to the "substantive and procedural" protections for court adjudication historically afforded by state laws for shareholders to challenge alleged abuses by corporate management (Pet. for Cert., pp. 5, 12).**

* The charges against Dr. Werner in the papers below were based on GAF's lawyer's hearsay affidavit and an unverified complaint.

** The major premise of this claim of purported "substantive and procedural" protection by *exclusive* courthouse adjudication is not established by GAF. No authority in New York or any other state is cited which holds that the corporate state law prohibits a predispute agreement to arbitrate an employment contract between a publicly held corporation and a senior executive or prohibits an arbitrator from dealing with a state law claim of waste in a publicly held

(footnote continued on next page)

In *Moses H. Cone Memorial Hospital*, this Court squarely rejected this same contention (460 U.S. at 24):

> "Section 2 [of the Federal Arbitration Act] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."

The misleading presentation of the case by GAF cannot obscure the significant fact that the arbitration agreement itself contained in the September 1981 employment contract is of long standing. The 1981 employment contract was entered into prior to any proxy contest or derivative action—two of the five of which were brought by Mr. Heyman who had orchestrated the proxy contest and replaced Dr. Werner and the other board members in December 1983.

The arbitration provision is a broad arbitration clause.* This same broad form of arbitration agreement has been in *each* of the four successive employment agreements between Dr. Werner and GAF since *1965* (Pet. App. A-21). Those employment agreements have been disclosed in annual proxy statements and in filings by the corporation with the Securities and Exchange Commission since 1965 when GAF emerged from federal government ownership and went public (Pet. App. A-21).

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corporation. The one cited Delaware case for such alleged lack of contractual capacity (Pet. for Cert., p. 11) does not deal with the effect of an agreement to arbitrate. Even if there was such a case, *Moses H. Cone Memorial Hospital* and *Southland Corp.* hold that any such state law prohibition is contrary to and, thus, superseded by the Federal Arbitration Act. This Court has made it perfectly clear that *only Congress*, not the states or the judiciary, can make exceptions to the Federal Arbitration Act. Congress has made no such exception for state law disputes between a publicly held corporation and a senior executive, and no such congressional legislation is or can be pointed to by GAF.

* Paragraph 12 of the 1981 employment contract provides in pertinent part: "In the event that any disagreement of any kind shall arise between the parties hereto as to any matter or thing whatsoever hereunder, such disagreement shall be arbitrated in the City of New York . . ." (Pet. App. A-2, A-21).

This arbitration provision, indeed, was first made part of Dr. Werner's 1965 employment contract at the time GAF's board members were appointed by President Johnson. This in itself refutes the erroneous implication which GAF seeks to convey of this arbitration provision suddenly appearing in Dr. Werner's 1981 employment contract through his purported "domination" (albeit such assertion is unsubstantiated and unfounded) of the several outside directors of GAF who approved the contract at a board meeting from which Dr. Werner absented himself (Pet. for Cert., pp. 7, 8).

Even more important, and dispositive, is that the basic claim sought to be raised by GAF in this Court is not properly before this Court because it was never properly raised in the courts below. In essence, GAF is contending in this Court, as it did for the first time in the Court of Appeals, that the arbitration provision itself is subject to challenge under Section 2 of the Federal Arbitration Act on "such grounds as exist at law or in equity for the revocation of any contract" because "GAF's management lacked the contractual capacity to enter into an agreement which purports to foreclose the corporation and its shareholders from proving in court their claims of mismanagement and breach of fiduciary duty" (Pet. for Cert., p. 11).

GAF, however, is foreclosed from such argument because its papers in support of its motion to stay arbitration did *not* contest the validity of the arbitration clause itself in the 1981 employment agreement, undoubtedly because it could not establish such contention. As the New York Court of Appeals cogently points out (Pet. App. A-5):

> "GAF's brief . . . [argues] that Werner's arbitration *clause* was a product of overreaching, but its petition claimed only that the *agreement* was void for waste and self-dealing and its papers contain nothing relating to the invalidity of the *clause* as distinct from the *agreement*. The issue, not having been considered by the courts below, is not properly before us. There-

fore, we do not consider it further (*Matter of Lane [Abel-Bey]*, 50 NY2d 864).'"*

In light of the specious nature of GAF's petition for certiorari, the real question raised is why it has imposed the burden, waste of resources and expense on this Court and Dr. Werner. The answer, unfortunately, is that the Heyman-led GAF is still pursuing a vendetta against Dr. Werner in an attempt to rewrite history and erase Dr. Werner's 42 years of contributions to the success of GAF, and to harass and intimidate Dr. Werner into dropping his attempt to enforce his rights under the employment contract through the agreed upon arbitral process.

The last day filing of GAF's petition for certiorari is a ploy which GAF decided upon after the third neutral arbitrator (a former judge) was selected and the arbitration process, after two years of meritless litigation by GAF, was about to begin. Now GAF is seeking to use its petition for a writ as a pretext to further delay the arbitration.

This Court, we believe, is being misused by GAF which is perverting "Congress' clear intent, in the Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible" (*Moses H. Cone Memorial Hospital*, 460 U.S. at 22).

The arbitration will put an end to the character assassination of outrageous lies concerning Dr. Werner which the Heyman-led GAF planted in *Forbes* and repeats in its petition to this Court. GAF will no longer be able to repeat the unfounded accusations made by its so-called "special committee" of nameless and faceless persons appointed by Mr. Heyman and chaired by the lawyer who represented Mr. Heyman in his two of the derivative actions against Dr. Werner.

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* In *Dean Witter Reynolds Inc.* v. *Byrd*, this Court likewise rejected the attempt by Byrd to present an argument concerning the arbitration agreement itself which had not been presented to the courts below. 470 U.S., at ——, 84 L.Ed.2d at 162, fn. 2.

CONCLUSION

The petition for a writ of certiorari should be denied, and costs allowed to respondent.

Dated: New York, New York
February 20, 1985

Respectfully submitted,

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